Nos. 07-597, 07-589, 07-588

FILED
DEC 3 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

UTILITY WATER ACT GROUP,

Petitioner,

v.

RIVERKEEPER INC., ET AL.,

Respondents.

PSEG FOSSIL LLC and PSEG NUCLEAR LLC,

Petitioners,

v.

RIVERKEEPER INC., ET AL.,

Respondents.

ENTERGY CORPORATION,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF THE STATE OF NEBRASKA, ET AL. IN SUPPORT OF UTILITY WATER ACT GROUP

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QUESTIONS PRESENTED

Whether the Second Circuit erred by holding that § 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b) prohibits the United States Environmental Protection Agency ("EPA") from considering the cost of a technology in comparison to the level of control it achieves and to the environmental "benefit" of that level of control?

Whether § 316(b) prohibits EPA from authorizing existing facilities to use restoration measures that, taken collectively with the existing characteristics of the cooling water intake structure, ensure that the intake structure minimizes "adverse environmental impact"?

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INTEREST OF AMICI[1]

The interests of the states are twofold. First, the States are the primary permitting authority under the Clean Water Act and have a compelling interest in ensuring consistency in application of environmental regulations. The lower court decision has created a conflict among the Circuits and created uncertainty in the application of § 316(b) of the Clean Water Act. 33 U.S.C. § 1326(b). The States need resolution of the circuit conflict before they can resolve numerous complicated and costly permit applications. The states also need the reaffirmation of the decades-long practice of using "restoration" under § 316(b) consistent with how that term is utilized under numerous other federal programs

Second, the states have a critical interest in preserving the efficacy of a program that, in the limited circumstances in which it is allowed, provides greater environmental benefits to the affected ecosystems than the narrow impingement/entrainment focus adopted by the lower court. If, as the Second Circuit held, states may not consider restoration, then a demonstrated, successful tool for ecosystem restoration will be unavailable to states. The granting of a National Pollution Discharge Elimination System ("NPDES") permit does not occur in a vacuum. The benefits of a coordinated and cooperative ecosystem

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file.

restoration between the federal government, states and stakeholders (including power plant operators) will be lost as a key player—power plants with cooling water intakes—will be removed from the equation.

REASONS FOR GRANTING THE PETITION

The petition should be granted for two reasons. First, this Court should grant review to remove the barrier created by the Second Circuit decision prohibiting implementation of a sound public policy of national importance. Second, this Court should grant review to resolve a conflict among the Circuits.

I. THE SECOND CIRCUIT DECISION BARS IMPLEMENTATION OF A SOUND PUBLIC POLICY OF NATIONAL IMPORTANCE.

The limited use of restoration allowed under § 316(b) of the Clean Water Act is an important public policy. Restoration is consistent with the public policy underlying § 316(b) as it allows for the minimization of adverse environmental impact. It is also consistent with the national policy favoring restoration of aquatic resources, embodied in a host of federal statutes and programs including § 404 of the Clean Water Act, federal highway programs, agricultural programs, natural resources damage restorations provisions under Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the

Pick-Sloan Act and all of the significant Water Resources Development Acts of the last three decades, including the Water Resources Development Act of 2007, Pub. Law 110-114.

Restoration projects are those that improve fish habitat, encourage fish spawning, or otherwise increase the supply of desirable fish, such as programs to stock water bodies with fish produced in hatcheries. Since the beginning of the modern Clean Water Act in 1972, EPA has interpreted § 316(b) to involve assessing existing intakes and the need for changes to those intakes based on consideration of the effects of the intake and its alternatives to the water body, and the environment, as a whole. Using this approach, EPA and the states have approved a number of restoration projects to help satisfy § 316(b).

This Court should grant review because the Second Circuit decision bars implementation of a key component of the national policy of restoration of aquatic resources. The decision illogically narrows our nation's focus from exploring options to restore surrounding ecosystems to focusing on only the impacts experienced by the specific fish, eggs and larvae impinged and entrained. In addition, by requiring compliance to be strictly based upon the performance standard and alterations to the existing intake characteristics, the decision limits the states' ability to choose the best or most effective alternatives for minimizing adverse environmental impact to the entire ecosystem affected by the permit applicant.

This Court should grant review to allow the limited use of restoration under § 316(b) as a key component of a systemic legislative intent. Restoration is consistent with the larger legislative scheme of Congress to encourage ecosystem restoration when and wherever possible. It is implausible to suggest that it was Congress' intent to prohibit the use of restoration under § 316(b), when Congress and the Executive Branch have approved or mandated restoration for almost every other program that impacts rivers, streams and water bodies.

There are numerous examples in statute and application where restoration is mandated or allowed. The Clean Water Act, itself, and the numerous Water Resources Development Acts provide the clearest guidance to the national import of including restoration as an option under § 316(b). One of the objectives of the Clean Water Act is to "restore . . . the . . . biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the Act's fundamental policies is to protect the rights of states to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. 33 U.S.C. § 1251(b). The National Environmental Policy Act requires EPA to use "all practicable means" to enhance the quality of renewable resources (42 U.S.C. § 4331(b)(6)) and to develop "to the fullest extent possible . . . appropriate alternatives" to recommended courses of action (42 U.S.C. § 4332(2)(E)). Likewise, § 404 of the Clean Water Act has long been interpreted to include restoration as a feature of that section's permit program. The § 404(b)(1) guidelines

promulgated in 1980 provide that "[h]abitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat." 40 C.F.R. 230.75(d)

Recently Congress passed, notwithstanding the objections of the President, the Water Resources Act of 2007, Pub. Law 110-114. Among the projects authorized was a comprehensive ecosystem restoration effort within the Missouri River basin, including multiple federal agencies, states, tribes and stakeholders. (Section 5018, Pub. Law 110-114). The Missouri River basin is home to numerous power plants that obtain the cooling water necessary to their operation from the Missouri River or its tributaries within the ten states that makeup the basin. Allowing the Second Circuit decision to stand would create the illogical result of removing the cooling water intake permitting decisions for these plants from the comprehensive efforts underway by removing the opportunity to use and coordinate restoration activities.

The Supreme Court should grant review because the Second Circuit decision unnecessarily reduces the choices states have in addressing site specific ecosystem restoration decisions. Most, if not all, of the 50 states have a public policy of protecting and enhancing wetlands and aquatic habitat. Each affected ecosystem has unique concerns that must be addressed in order to meet the goals of the Clean Water Act. The flexibility to accept restoration in lieu of, or together with, changes to the existing intake equipment and an operational restriction is necessary to

give the states the greatest opportunity to "minimize adverse environmental impact" at all sites.

In the view of the amici states, it is not likely that Congress intended that restoration be allowed under several federal programs, including § 404 of the Clean Water Act, but be forbidden under only one—§ 316(b). For these reasons, the amici states respectfully request that the Supreme Court grant the writ of certiorari.

II. THE SECOND CIRCUIT DECISION CONFLICTS WITH THE LONG-STANDING DECISION OF THE FIRST CIRCUIT.

The decision of the Second Circuit to reject cost benefit analysis and restoration under Phase II of the permitting process directly conflicts with the First Circuit's approval of EPA's long-standing interpretation of § 316(b), which allows for the use of both. *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306 (1st Cir. 1979). Examples of the direct conflict between the two Circuits' decisions can be found at pages 10-11 and 21-22 of the Utility Water Act Group's petition for certiorari and pages 32-37 of the PSEG Fossil LLC and PSEG Nuclear LLCs' petition for certiorari.

It is imperative that this conflict be resolved because the amici states, like EPA and other states, have relied on *Seacoast* to allow for cost/benefit in making permit decisions. The Second Circuit's divergence from the longstanding interpretation of

§ 316(b), leaves the states in the precarious position of continuing to follow *Seacoast* or revisiting permitting determinations at a great cost and expense to the states, the permit applicants and the consumers who are dependent on the power produced by the plants in question.

Absent resolution by this Court, the states will have to reevaluate and reissue dozens of permits, each involving millions of dollars in infrastructure development by the permit applicants, which the states only recently reissued with conditions based on the Phase II rule adopted by EPA. For both those permits and for permits still pending reissuance, states will have to decide whether or not they may continue to do a cost benefit analysis and apply the wholly disproportionate test. The states will have to determine how to treat facilities that have spent millions of dollars on compliance strategies that include restoration. This will only further burden what are already overstrained state resources. Likewise, the increased costs will substantially increase already inflated energy prices, further taxing a precariously positioned national economy.

Absent the ability to use a cost benefit analysis, none of these increased costs and impacts will be justified by any determination of corresponding benefits to the ecosystem and species affected by cooling water intakes. The inability to use restoration will result in missed opportunities to make broader, more permanent improvements in the aquatic and terrestrial ecosystems. Inevitably, the uncertainty

created by the split between the First and Second Circuits, combined with the adverse consequences of following the Second Circuit's approach, will spawn needless litigation and further delay, which states and their citizens can ill afford.

CONCLUSION

For the reasons stated above, the amici states request this Court grant the petitions for certiorari.

Respectfully submitted,

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